

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DUDLEY A. KING	)	
Appellant,	)	
	)	
v.	)	CAVC No. 16-2959
	)	EAJA
	)	
ROBERT L. WILKIE,	)	
ACTING SECRETARY OF	)	
VETERANS AFFAIRS,	)	
Appellee	)	

APPELLANT'S APPLICATION FOR AN  
AWARD OF ATTORNEYS FEES AND EXPENSES  
PURSUANT TO 28 U.S.C. ' 2412(d)

Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), and the Court's Rule 39, Appellant, through counsel, seeks a total fee in the amount of **\$30,600.89**.

The basis for the application is as follows:

**Grounds for an Award**

This Court has identified four elements as being necessary to warrant an award by the Court of attorneys' fees and expenses to an eligible party pursuant to the EAJA. These are: (1) a showing that the appellant is a prevailing party; (2) a showing that the appellant is eligible for an award; (3) an allegation that the government's position is not substantially justified; and (4) an itemized statement

of the fees sought. *Owens v. Brown*, 10 Vet. App. 65, 66 (1997) (quoting *Bazalo*, 9 Vet. App. at 308). See also 28 U.S.C. §§ 2412(d)(1)(A),(B).

As will be demonstrated below, Appellant satisfies each of the above-enumerated requirements for EAJA.

1. THE APPELLANT SATISFIES EACH OF THE REQUIREMENTS FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES

A. *The Appellant Is a Prevailing Party*

In *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 121 S.Ct 1835 (2001) (hereafter "Buckhannon"), the Supreme Court explained that in order to be a prevailing party the applicant must receive "at least some relief on the merits" and the relief must materially alter the legal relationship of the parties. 532 U.S. at 603-605. The Federal Circuit adopted the *Buckhannon* test in *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed. Cir. 2002) and applied it to an EAJA applicant. The Federal Circuit explained in *Rice Services, LTD. v. United States*, that "in order to demonstrate that it is a prevailing party, an EAJA applicant must show that it obtained an enforceable judgment on the merits or a court ordered consent decree that materially altered the legal relationship between the parties, or the equivalent of either of those." 405 F.3d 1017, 1025 (Fed. Cir. 2005).

In *Zuberi v. Nicholson*, 19 Vet. App. 541 (2006), this Court explained that the Federal Circuit case of *Akers v. Nicholson*, 409 F.3d 1356 (Fed. Cir. 2005) "did not change the focus for determining prevailing party status from a standard that looks to the basis for the remand to one that looks to the outcome of the remand. *Akers* simply did not involve a remand that was predicated on an administrative error." 19 Vet. App. at 547. (internal quotations omitted). The Court held in *Zuberi* that *Motorola* provided the proper test for prevailing party. *Id.* Next in *Kelly v. Nicholson*, 463 F.3d 1349 (Fed. Cir. 2006), the Federal Circuit held that:

To be considered a prevailing party entitled to fees under EAJA, one must secure some relief on the merits. Securing a remand to an agency can constitute the requisite success on the merits. [W]here the plaintiff secures a remand requiring further agency proceedings because of alleged error by the agency, the plaintiff qualifies as a prevailing party ... without regard to the outcome of the agency proceedings where there has been no retention of jurisdiction by the court.

*Id.* at 1353 (internal citations and quotations omitted).

The Appellant in the instant matter is a prevailing party. After oral argument, in a precedential decision, the Court set aside and remanded the Board's June 1, 2016 decision holding that the availability of a higher schedular rating is irrelevant in an extraschedular analysis and that this interpretation of the law is a general principle under §3.321(b) and does not depend on the particular type of

claim at issue. See pages 1-11 of the Decision. Mandate entered on May 8, 2018. Based upon the foregoing, Mr. King is a prevailing party.

*B. Appellant Is Eligible For An EAJA Award*

Appellant also satisfies the EAJA requirement that his net worth at the time his appeal was filed did not exceed \$2,000,000. 28 U.S.C. § 2412(d)(2)(B). Mr. King had a net worth under \$2,000,000 on the date this action was commenced. See Paragraph 3 of the fee agreement filed with the Court. Therefore, Mr. King is a person eligible to receive an award under the EAJA.

*C. The Position of the Secretary Was Not Substantially Justified*

In *White v. Nicholson*, 412 F.3d 1314 (Fed. Cir. 2004) the Federal Circuit applied the totality of the circumstances test and noted that "EAJA requires that the record must supply the evidence of the Government's substantial justification." 412 F.3d at 1316. The Secretary's position during proceedings before the Agency and in Court was not reasonable, either in law or in fact, and accordingly the Secretary's position was not substantially justified at either the administrative or litigation stage in this case. There thus is nothing substantially justified in the Board's failure to properly interpret and apply the law. Moreover, there is no evidence that special circumstances exist in Appellant's case that would make an award of reasonable fees and expenses unjust. 28 U.S.C. § 2412(d)(1)(A).

2. ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF REASONABLE FEES AND EXPENSES

Appellant has claimed a reasonable amount of attorneys' fees, predicated upon "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Ussery v. Brown*, 10 Vet. App. 51, 53 (1997) (quoting *Elczyn*, 7 Vet. App. at 176-177).

Ten attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Shawn Murray, Danielle M. Gorini, Dana Weiner, Megan Ellis, Barbara Cook, Christian McTarnaghan, Nicholas Phinney, Lindy Nash, Jenna Zellmer, and Zachary Stolz.<sup>1</sup> Attorney Shawn Murray graduated from Boston

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<sup>1</sup>"There is nothing inherently unreasonable about a client having multiple attorneys, and they may all be compensated if they are not unreasonably doing the same work and are being compensated for the distinct contribution of each lawyer." *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1301 (11th Cir. 1988); see also *Baldrige v. Nicholson*, 19 Vet.App. 227, 237-38 (2005) ("the fees sought must be 'based on the distinct contribution of each individual counsel.'"). "The use in involved litigation of a team of attorneys who divide up the work is common today for both plaintiff and defense work." *Johnson v. Univ. Coll. of Univ. of Alabama in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983) holding modified by *Gaines v. Dougherty Cty. Bd. of Educ.*, 775 F.2d 1565 (11th Cir. 1985). "Careful preparation often requires collaboration and rehearsal[.]" *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 860 (1st Cir. 1998). As demonstrated in Exhibit A, each attorney involved in the present case provided a distinct, and non-duplicative contribution to the success of the appeal. See *Baldrige*, 19 Vet.App. at 237 ("An application for fees under EAJA where multiple attorneys are involved must also explain the role of each lawyer in the litigation and the tasks assigned to each, thereby describing the distinct

College Law School in 2014 and the *Laffey* Matrix establishes that \$346.00 is the prevailing market rate for an attorney with his experience.<sup>2</sup> Danielle Gorini graduated from Roger Williams University Law School in 2005 and the *Laffey* Matrix establishes that \$483.00 is the prevailing market rate for an attorney with her experience. Dana Weiner graduated from Roger Williams University Law School in 2015 and the *Laffey* Matrix establishes that \$334.00 is the prevailing market rate for an attorney with her experience. Megan Ellis graduated from Boston College Law School in 2014 and the *Laffey* Matrix establishes that \$346.00 is the prevailing market rate for an attorney with her experience. Barbara Cook graduated from University of Michigan Law School in 1977 and the *Laffey* Matrix establishes that \$602.00 is the prevailing market rate for an attorney with her

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contribution of each counsel.”).

<sup>2</sup>The U.S. Attorney’s Office maintains a matrix, known as the Laffey Matrix, of prevailing market rates for attorneys by years of practice, taking into account annual price increases, pursuant to *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff’d in part* by 746 F.2d.4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021, 105 S. Ct. 3488 (1985). This Court has approved the use of the Laffey Matrix for determining the prevailing market rate for EAJA fees. *See, e.g., Wilson v. Principi*, 16 Vet. App. 509, 213 (2002) (finding the Laffey Matrix a “reliable indicator of fees...particularly as to cases involving fees to be paid by government entities or determined under fee-shifting statutes”), *vacated on other grounds* by 391 F.3d 1203 (Fed. Cir. 2004); *see also Sandoval*, 9 Vet. App. at 181 (using the Laffey Matrix as an indicator of prevailing market rate and holding that once a prevailing market rate is established, the government has the burden of producing evidence to show that the rate is erroneous.) *See* Exhibit B (Laffey Matrix).

experience. Christian McTarnaghan graduated from Suffolk University Law School in 2014 and the *Laffey* Matrix establishes that \$346.00 is the prevailing market rate for an attorney with his experience. Nicholas Phinney graduated from Roger Williams University Law School in 2007 and the *Laffey* Matrix establishes that \$483.00 is the prevailing market rate for an attorney with his experience. Lindy Nash graduated from Suffolk University Law School in 2015 and the *Laffey* Matrix establishes that \$334.00 is the prevailing market rate for an attorney with her experience. Jenna Zellmer graduated from Boston University Law School in 2013 and the *Laffey* Matrix establishes that \$346.00 is the prevailing market rate for an attorney with her experience. Zachary Stolz graduated from the University of Kansas School of Law in 2005 and the *Laffey* Matrix establishes that \$483.00 is the prevailing market rate for an attorney with his experience.

In addition, one intern, Madeline Becker, worked on this case. Ms. Becker is a law student at Boston College Law School and is scheduled to graduate in May 2018. The Court has found that "the *Laffey* Matrix . . . is a reliable indicator of fees and is far more indicative of the prevailing market rate in the jurisdiction, particularly as to cases involving fees to be paid by government entities . . . ." *See Wilson v. Principi*, 16 Vet.App. 509, 513 (2002). According to the *Laffey* Matrix, the market rate for law clerks from June 1, 2010, and after-the period of time in

which the work was completed-was \$135.00. She has, therefore, limited the rate at which fees are claimed for those hours to the statutory rate of \$125.00 per hour plus the cost-of-living allowance ("COLA"), which is adjusted to the midpoint of when the work was performed and then voluntarily reduced. *See Levernier Constr., Inc. v. United States*, 947 F.2d 497, 504 (Fed. Cir. 1991) ("EAJA authorizes the award of the lower of either the prevailing market rate or [\$125.00] per hour plus a COLA"); *Elczyn v. Brown*, 7 *Vet.App.* 170, 181 (1994) ("[T]he Court will permit-and encourage-the selection of a single mid-point date, such as the date upon which an appellant's principal brief . . . is filed with the Court, as the base for calculating a cost of living increase."). Therefore, Appellant seeks attorney's fees at the rate of \$125.00 per hour for representation services before the Court for Ms. Becker's time. Attached as Exhibit A to this fee petition are the hours worked for all attorneys.

Appellant seeks attorneys' fees at the rate of \$198.49 per hour for Mr. Murray, Ms. Gorini, Ms. Weiner, Ms. Ellis, Mr. McTarnaghan, Mr. Phinney, Ms. Nash, Ms. Zellmer, and Mr. Stolz for representation services before the Court.<sup>3</sup>

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<sup>3</sup>This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Northeast. *See Mannino v. West*, 12 *Vet. App.* 242, 243 (1999). The increase was calculated for the period from March 29, 1996 (the start date for the EAJA rate), to March 2017 the chosen mid-point date for the litigation in this case, using



This rate per hour, multiplied by the number of hours billed for these nine attorneys (129.30) results in a total attorney's fee amount of \$25,664.83.

Appellant seeks attorney's fees at the rate of \$192.91 per hour for Ms. Cook's representation services before the Court.<sup>4</sup> This rate per hour, multiplied by the number of hours billed for Ms. Cook (8.90) results in a total attorney's fee amount of \$1,716.90.

In addition, Appellant seeks attorney's fees at the rate of \$125.00 per hour for representation services before the Court for Ms. Becker's time. This rate per hour, multiplied by the number of hours billed (14.20) results in a total attorney's fee amount of \$1,775.00.

In addition, Appellant seeks reimbursement for the following expenses:

Airfare to and from Providence, RI for oral argument -ZMS:	\$183.40
Airfare to and from Providence, RI for oral argument – DW:	\$126.20
Hotel in Washington, DC for oral argument – ZMS:	\$459.28

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the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

<sup>4</sup> This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Cincinnati. See *Mannino v. West*, 12 Vet. App. 242, 243 (1999). The increase was calculated for the period from March 29, 1996 (the start date for the EAJA rate), to March 2017 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

Hotel in Washington, DC for oral argument – DW:	\$459.28
Travel expenses in Washington, DC – ZMS:	\$45.54
Travel expenses in Washington, DC – DW:	\$19.46
Airport parking in Providence, RI – ZMS:	\$55.00
Airport parking in Providence, RI – DW:	\$46.00

Based upon the foregoing, the total fee amount is **\$30,600.89**.

I, Zachary M. Stolz, am the lead counsel in this case. I certify that I have reviewed the combined billing statement and am satisfied that it accurately reflects the work performed by all representatives. I have considered and eliminated all time that I believe, based upon my over ten years of practicing before this Court, is either excessive or redundant.

Respectfully submitted,  
Dudley A. King  
By His Attorneys,  
CHISHOLM CHISHOLM & KILPATRICK  
/s/Zachary M. Stolz  
One Turks Head Place, Ste. 1100  
Providence, Rhode Island 02903  
(401) 331-6300  
Fax: (401) 421-3185

## Exhibit A

		<u>Hours</u>
6/14/2016 JZ	Reviewed BVA decision, recommended case for appeal.	0.30
8/25/2016 DMG	Reviewed file and appeal documents. Filed Notice of Appeal, Notice of Appearance for Robert Chisholm as lead counsel, and Fee Agreement with the Court. Received, reviewed, and saved Court confirmation email to the file. Updated case file	0.20
8/29/2016 JZ	Was assigned case for EIR. Drafted and filed notice of appearance, reviewed case file notes and docket sheet. Reviewed and saved copy of BVA decision transmittal. Updated file.	0.20
8/29/2016 DMG	Reviewed emails from Court with docketed appeal documents. Posted emails to the file. Checked Court docket sheet to ensure Notice of Appeal, Notice of Appearance for lead counsel, and Fee Agreement were properly docketed. Updated case information and case file	0.20
10/19/2016 JZ	Received and reviewed CAVC email re: Aee notice of appearance. Reviewed notice. Updated client file.	0.10
10/19/2016 LN	assigned case, prepared and efiled notice of appearance, reviewed docket for procedural status, updated case file	0.20
10/20/2016 LN	Received and reviewed RBA notice, calculated deadline for dispute and review, updated file	0.10
10/24/2016 LN	Received and reviewed notice that RBA was uploaded to the file, ensured correct BVA decision was included, updated file	0.10

## Exhibit A

		<u>Hours</u>
11/4/2016 LN	Case mapped and reviewed RBA pages 1-1200	2.10
11/8/2016 LN	Prepared status letter to client, updated file	0.10
11/8/2016 LN	Drafted PBC memo	1.00
11/8/2016 LN	Case mapped and reviewed RBA pages 1201-1995	1.00
11/9/2016 LN	Spoke to VA counsel re stay due to Doucette	0.10
11/9/2016 LN	Spoke to VA counsel again regarding stay due to Doucette	0.10
11/9/2016 LN	received and reviewed notice to file brief, calculated deadline for brief, updated calendar	0.10
11/10/2016 LN	Received and reviewed Secretary's additional notice of appearance, updated file	0.10
11/15/2016 LN	reviewed PBC order, calculated deadline for PBC memo, updated calendar and file	0.10
11/28/2016 NP	Proofread PBC memo & reviewed memo for legal accuracy. Suggested edits to same.	0.10
12/1/2016 LN	made final edits and revisions to PBC memo, submit PBC memo via email to CLS and OGC, prepare Rule 33 cert of service and file with court, update clients file	0.60
12/5/2016 LN	Responded to VA counsel email re rescheduling PBC	0.10
12/16/2016 LN	Called client to discuss PBC, left voice mail, note to file.	0.10

## Exhibit A

		<u>Hours</u>
12/16/2016 LN	Prepared for and attended PBC, made note to file on outcome	0.90
12/29/2016 LN	Called client re PBC	0.30
2/27/2017 LN	Reviewed BVA decision and case map of RBA; began drafting statement of the case for opening brief	0.50
2/28/2017 LN	Completed drafting argument section of opening brief and drafted remaining sections.	1.50
2/28/2017 LN	Continued drafting statement of the case for opening brief; began drafting argument section.	3.00
3/1/2017 CM	Reivew opening brief for legal accuracy. Suggest adding additional Yancy argumnet.	0.80
3/1/2017 LN	Began edits and revisions to opening brief	1.80
3/3/2017 LN	Additional edits and revisions to opening brief	2.00
3/3/2017 LN	final edits and revisions to language in the brief, ensured accuracy of record cites and case law, filed brief with the court	2.50
4/28/2017 LN	Received, reviewed, and responded to email from Secretary regarding extension for their brief	0.10
6/16/2017 LN	Received and reviewed Secretary's brief, updated clients file	0.30
7/27/2017 MB	Reviewing case map of record and pleadings; outlined arguments for reply brief	2.70
7/28/2017 MB	Continued drafting the reply brief - added arguments from most recent mem decs on BHL requiring the Board to take non-hearing	2.80

## Exhibit A

		<u>Hours</u>
	symptoms into account for extraschedular consideration	
7/28/2017 MB	Began drafting reply brief	3.00
7/31/2017 MB	Completed draft of reply brief	0.40
8/1/2017 MB	Began making edits to reply brief	1.50
8/1/2017 LN	Reviewed reply brief and suggested edits and revisions to same. Ensured accuracy of case law, record cites, substance, and grammar.	2.00
8/2/2017 MB	Made final edits to reply brief - researching mem decs for use refuting the Secretary's argument that Doucette's list of examples was dicta	0.80
8/2/2017 MB	Continued editing reply brief	3.00
8/7/2017 LN	Reviewed revised reply brief to ensure completeness of edits and suggested additional revisions prior to filing - edits to Johnson argument and responding to more of VA's argument.	1.70
8/14/2017 LN	made final edits and revisions to reply brief, filed reply brief with the court.	3.00
8/18/2017 LN	received and reviewed notice that ROP was filed, updated clients file	0.10
8/18/2017 LN	reviewed ROP, prepared letter of acceptance and filed with the Court, updated clients file	0.60
8/23/2017 LN	received and reviewed notice that judge was assigned, updated clients file	0.10

## Exhibit A

		<u>Hours</u>
8/29/2017 LN	received and reviewed notice that case was submitted to panel, updated file	0.10
8/30/2017 LN	received, reviewed, and responded to VA counsel regarding motion for oral argument, updated file	0.10
8/30/2017 LN	drafted motion for oral argument	1.00
8/30/2017 LN	drafted motion to file motion for oral argument out of time, drafted motion for clarification	1.00
9/1/2017 LN	continued drafting motion for clarification	0.80
9/2/2017 BJC	Review motion to file motion for oral argument out of time, motion for oral argument, and motion for clarification, suggest edits to all three motions for clarity, add Frankel point	0.40
9/6/2017 LN	edits and revisions to motion for oral argument and motion for clarification	0.80
9/7/2017 LN	researched mem decs with opposing Doucette views, continued to edit motion for oral argument	1.00
9/11/2017 LN	final edits and revisions to motion to file motion for oral argument out of time and motion for oral argument, filed same with the court	0.40
9/13/2017 LN	received and reviewed motion for leave and motion for oral argument grant, updated file	0.10
9/13/2017 ME	Reviewed case notes, briefs, evidence of record, and supplemental briefing order in preparation for drafting response to supplemental order	0.70
9/13/2017 ME	Researched recent memorandum decisions involving extraschedular issues	1.30

## Exhibit A

		<u>Hours</u>
9/13/2017 ME	Began drafting supplemental pleading	2.10
9/13/2017 ME	Researched and reviewed relevant precedential decisions regarding extraschedular standards in preparation for drafting response to supplemental order	2.90
9/18/2017 ME	Discussed arguments for supplemental pleading with co-counsel regarding appropriate interpretation of 3.321	0.40
9/18/2017 ME	Continued drafting supplemental memorandum, edited arguments, searched for additional relevant case law	3.00
9/19/2017 ME	Prepared and filed notice of appearance. Updated file.	0.10
9/19/2017 ME	Received and reviewed order scheduling oral argument, updated client file and calendar to reflect date scheduled	0.10
9/26/2017 LN	called client to provide status update, updated file	0.10
9/26/2017 ME	Reviewed case notes and pleadings in case with similar extraschedular issues, reviewed Secretary concession in pleadings to Court regarding impact of higher ratings on extraschedular analysis in preparation of continuing to edit supplemental pleading	0.40
9/26/2017 ME	Continued drafting and revising arguments for supplemental pleading	1.50
9/28/2017 LN	called client to provide status update, updated file	0.10
9/28/2017 ME	Finished draft of supplemental pleading	1.70



## Exhibit A

		<u>Hours</u>
9/29/2017 BJC	Review supplemental pleading and suggest edits	0.50
9/30/2017 BJC	Review relevant case law and analyze case in preparation of discussing edits to supplemental pleading with ME	1.70
9/30/2017 ZMS	Reviewed pleadings and notes on case. Reviewed latest draft of supplemental pleading and suggested additional edits to same.	2.50
10/2/2017 ME	Discussed supplemental pleading and potential strategies for oral argument with co-counsel	0.50
10/2/2017 ZMS	Reviewed pleadings and notes on case. Reviewed record in preparation for review of draft of response to Court order.	2.80
10/3/2017 ME	Received and reviewed Appellee notice of appearance, updated client file and calendar to reflect receipt and new counsel	0.10
10/3/2017 ME	Reviewed latest draft of supplemental pleading, made comments and suggested areas for clarification	0.80
10/3/2017 ZMS	Made additional edits to draft of response to Court order.	1.20
10/4/2017 ME	Received notice of filing of Appellee supplemental brief, reviewed brief to determine if further edits to appellant's supplemental brief were necessary	0.50
10/4/2017 ME	Incorporated additional edits into draft supplemental brief, checked citations and flow of document	0.80

## Exhibit A

		<u>Hours</u>
10/5/2017 ME	E-filed supplemental pleading, updated client file and calendar to reflect submission	0.10
11/3/2017 ZMS	Telephone conversation with client concerning upcoming oral argument.	0.30
11/3/2017 ZMS	Continued preparing for oral argument including research on recent Doucette cases	2.50
11/3/2017 ZMS	Began preparing for oral argument including review of entire record.	3.00
11/7/2017 ZMS	Continued preparation for oral argument including further review of record and outline of relevant evidence.	1.80
11/7/2017 SDM	locate and organize relevant documents for oral argument, begin reviewing pleadings to prepare for walk through of oral argument	2.10
11/8/2017 BJC	Prepared for and participate in walk through of oral argument	1.40
11/8/2017 DNW	Reviewed case materials in preparation for walk through for oral argument; updated file.	0.70
11/8/2017 SDM	participate in walk through for oral argument	1.00
11/8/2017 DNW	Participated in walk through for oral argument; discussed case strategy and issues.	1.10
11/8/2017 ME	Prepared for and participated in oral argument walk-through	1.40
11/8/2017 JZ	Researched case law, reviewed case file notes, pleadings. Participated in oral argument walk through - discussed E-S framework, opening, potential questions and answers	1.80

## Exhibit A

		<u>Hours</u>
11/8/2017 ZMS	Prepared for and participated in walk through of argument with Dana Weiner, Robert Chisholm, Megan Ellis, Shawn Murray, and Barb Cook.	2.00
11/8/2017 ZMS	Continued preparation for oral argument including review of recent hearing loss and extraschedular cases and Court and Board trends.	3.00
11/9/2017 ZMS	Continued preparation for oral argument. Focus on problems identified during walk through.	2.90
11/10/2017 BJC	Participate in moot	1.70
11/10/2017 ME	Participated in moot argument	1.70
11/10/2017 DNW	Participated in moot; discussed alterations to case strategy and issues in case with co-counsel.	1.70
11/10/2017 SDM	participate in moot argument as VA, participate in discussion of argument	1.70
11/10/2017 ZMS	Prepared for and participate in formal moot.	2.80
11/10/2017 SDM	review documents, caselaw, prepare argument for moot	3.00
11/10/2017 ZMS	Outlined argument and assembled oral argument materials.	3.00
11/11/2017 BJC	Review OGC brief, regulations, and case law to refine arguments to contribute to oral argument preparation	1.40
11/13/2017 DNW	Reviewed extraschedular case law to contribute to oral argument preparation	0.10
11/14/2017 BJC	prep for and participate in moot, opening statement	1.60

## Exhibit A

		<u>Hours</u>
11/14/2017 JZ	Participated in final moot.	1.60
11/14/2017 ME	Participated in final moot argument	1.60
11/14/2017 ZMS	Traveled to Washington, DC for argument.	2.00
11/14/2017 ZMS	Prepared for and participate in final moot court.	3.00
11/15/2017 DNW	Final review of pleadings in preparation for oral argument.	1.00
11/15/2017 ZMS	Final review of case law for oral argument including making final notes and outlines.	2.80
11/16/2017 DNW	Travel from hotel to CAVC.	0.40
11/16/2017 DNW	Travel from CAVC to DC airport.	0.40
11/16/2017 DNW	Travel back from PVD airport.	0.40
11/16/2017 ZMS	Participated in oral argument at CAVC.	1.00
11/16/2017 DNW	Participated in oral argument as second chair.	1.00
11/16/2017 DNW	Arrived at CAVC and set up in library; participated in pre-argument meeting with OGC and Mr. Block; set up in Courtroom for argument.	1.00
11/16/2017 DNW	Flight from DC to PVD.	1.50
11/16/2017 ZMS	Continued final review of case for oral argument including making final notes and outlines. Traveled to Court for argument.	2.50
11/19/2017 ZMS	Traveled back from DC.	2.00
12/26/2017 ZMS	Reviewed Court's precedential decision, pleadings, and notes in case. Prepared letter to client concerning Court's decision. Ensured case	1.00

## Exhibit A

		<u>Hours</u>
	file was updated with necessary letters, pleadings, and correspondence so that client could be properly informed of case progress, disposition, and next steps.	
1/12/2018 ZMS	Reviewed Secretary's motion for reconsideration. Memo to file.	0.60
2/8/2018 BJC	Review and suggest edits to response to sec motion	0.20
2/8/2018 CM	Draft and file notice of appearance. Updated file.	0.10
2/8/2018 CM	Draft motion for leave and motion in response to motion for reconsideration.	1.80
2/8/2018 ZMS	Discussed VA clarification of 3.321 with Christian McTarnaghan and conducted legal research on same in preparation of editing response to VA motion	2.30
2/8/2018 ZMS	Discussed motions for leave and response concerning Court's pending en banc review. Reviewed and revised motions drafted by Christian. Filed motions.	3.00
3/8/2018 ME	Called client, updated him on Court decision and next steps in appeal	0.20
3/8/2018 ZMS	Reviewed Court's denial of en banc reconsideration. Prepared letter to client concerning entry of Court's judgment.	0.50
5/8/2018 ME	Received notice of mandate, reviewed for accuracy, updated client file and calendar to reflect receipt and new deadline	0.10

## Exhibit A

		<u>Hours</u>
5/8/2018 DMG	Prepared and e filed Notice of Appearance. Received, reviewed, and saved Court confirmation email. Checked docket sheet to ensure proper filing. Updated case file.	0.20
5/8/2018 ZMS	Reviewed EAJA Application for proofreading purposes and to ensure billing accuracy.	0.70
5/8/2018 DMG	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	1.80
		<hr style="width: 10%; margin-left: auto; margin-right: 0;"/>
		<u>Amount</u>
		152.40 \$29,156.73
Expenses		
	Airfare for oral argument - ZS	183.40
	Airfare for oral argument- DW	126.20
	Filing Fee	50.00
	Hotel - Oral Argument - ZS	459.28
	Hotel- Oral Argument- DW	459.28
	Parking at airport - DW	46.00
	Parking at airport - ZMS	55.00
	Travel in DC for Oral Arg - DW	19.46
	Travel in DC for Oral Arg - ZS	45.54
		<hr style="width: 10%; margin-left: auto; margin-right: 0;"/>
	Total Expenses	\$1,444.16

## Exhibit A

	<u>Amount</u>
152.40	\$30,600.89

## Timekeeper Summary

<u>Name</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
Barbara J. Cook	8.90	192.91	\$1,716.90
Christian McTarnaghan	2.70	198.49	\$535.92
Dana Weiner	9.30	198.49	\$1,845.97
Danielle M. Gorini	2.40	198.49	\$476.38
Jenna Zellmer	4.00	198.49	\$793.96
Lindy Nash	31.80	198.49	\$6,312.01
Madeline Becker	14.20	125.00	\$1,775.00
Megan Ellis	22.00	198.49	\$4,366.80
Nicholas Phinney	0.10	198.49	\$19.85
Shawn D. Murray	7.80	198.49	\$1,548.22
Zachary M. Stolz	49.20	198.49	\$9,765.72

**USAO ATTORNEY'S FEES MATRIX — 2015-2018***Revised Methodology starting with 2015-2016 Year*

Years (Hourly Rate for June 1 – May 31, based on change in PPI-OL since January 2011)

Experience	2015-16	2016-17	2017-18
31+ years	568	581	602
21-30 years	530	543	563
16-20 years	504	516	536
11-15 years	455	465	483
8-10 years	386	395	410
6-7 years	332	339	352
4-5 years	325	332	346
2-3 years	315	322	334
Less than 2 years	284	291	302
Paralegals & Law Clerks	154	157	164

*Explanatory Notes*

1. This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared by the Civil Division of the United States Attorney's Office for the District of Columbia (USAO) to evaluate requests for attorney's fees in civil cases in District of Columbia courts. The matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412(b) (Equal Access to Justice Act). The matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, or by other Department of Justice components, or in other kinds of cases. The matrix does **not** apply to cases in which the hourly rate is limited by statute. *See* 28 U.S.C. § 2412(d).
2. A "reasonable fee" is a fee that is sufficient to attract an adequate supply of capable counsel for meritorious cases. *See, e.g., Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Consistent with that definition, the hourly rates in the above matrix were calculated from average hourly rates reported in 2011 survey data for the D.C. metropolitan area, which rates were adjusted for inflation with the Producer Price Index-Office of Lawyers (PPI-OL) index. The survey data comes from ALM Legal Intelligence's 2010 & 2011 Survey of Law Firm Economics. The PPI-OL index is available at <http://www.bls.gov/ppi>. On that page, under "PPI Databases," and "Industry Data (Producer Price Index - PPI)," select either "one screen" or "multi-screen" and in the resulting window use "industry code" 541110 for "Offices of Lawyers" and "product code" 541110541110 for "Offices of Lawyers." The average hourly rates from the 2011 survey data are multiplied by the PPI-OL index for May in the year of the update, divided by 176.6, which is the PPI-OL index for January 2011, the month of the survey data, and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
3. The PPI-OL index has been adopted as the inflator for hourly rates because it better reflects the mix of legal services that law firms collectively offer, as opposed to the legal services that typical consumers use, which is what the CPI-



Legal Services index measures. Although it is a national index, and not a local one, *cf. Eley v. District of Columbia*, 793 F.3d 97, 102 (D.C. Cir. 2015) (noting criticism of national inflation index), the PPI-OL index has historically been generous relative to other possibly applicable inflation indexes, and so its use should minimize disputes about whether the inflator is sufficient.

4. The methodology used to compute the rates in this matrix replaces that used prior to 2015, which started with the matrix of hourly rates developed in *Laffey v. Northwest Airlines, Inc.* 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985), and then adjusted those rates based on the Consumer Price Index for All Urban Consumers (CPI-U) for the Washington-Baltimore (DC-MD-VA-WV) area. Because the USAO rates for the years 2014-15 and earlier have been generally accepted as reasonable by courts in the District of Columbia, see note 9 below, the USAO rates for those years will remain the same as previously published on the USAO's public website. That is, the USAO rates for years prior to and including 2014-15 remain based on the prior methodology, *i.e.*, the original *Laffey* Matrix updated by the CPI-U for the Washington-Baltimore area. See *Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, --- F. Supp. 3d ---, 2015 WL 6529371 (D.D.C. 2015) and Declaration of Dr. Laura A. Malowane filed therein on Sept. 22, 2015 (Civ. Action No. 12-1491, ECF No. 46-1) (confirming that the USAO rates for 2014-15 computed using prior methodology are reasonable).
5. Although the USAO will not issue recalculated *Laffey* Matrices for past years using the new methodology, it will not oppose the use of that methodology (if properly applied) to calculate reasonable attorney's fees under applicable fee-shifting statutes for periods prior to June 2015, provided that methodology is used consistently to calculate the entire fee amount. Similarly, although the USAO will no longer issue an updated *Laffey* Matrix computed using the prior methodology, it will not oppose the use of the prior methodology (if properly applied) to calculate reasonable attorney's fees under applicable fee-shifting statutes for periods after May 2015, provided that methodology is used consistently to calculate the entire fee amount.
6. The various "brackets" in the column headed "Experience" refer to the attorney's years of experience practicing law. Normally, an attorney's experience will be calculated starting from the attorney's graduation from law school. Thus, the "Less than 2 years" bracket is generally applicable to attorneys in their first and second years after graduation from law school, and the "2-3 years" bracket generally becomes applicable on the second anniversary of the attorney's graduation (*i.e.*, at the beginning of the third year following law school). See *Laffey*, 572 F. Supp. at 371. An adjustment may be necessary, however, if the attorney's admission to the bar was significantly delayed or the attorney did not otherwise follow a typical career progression. See, *e.g.*, *EPIC v. Dep't of Homeland Sec.*, 999 F. Supp. 2d 61, 70-71 (D.D.C. 2013) (attorney not admitted to bar compensated at "Paralegals & Law Clerks" rate); *EPIC v. Dep't of Homeland Sec.*, 982 F. Supp. 2d 56, 60-61 (D.D.C. 2013) (same). The various experience levels were selected by relying on the levels in the ALM Legal Intelligence 2011 survey data. Although finer gradations in experience level might yield different estimates of market rates, it is important to have statistically sufficient sample sizes for each experience level. The experience categories in the current USAO Matrix are based on statistically significant sample sizes for each experience level.
7. ALM Legal Intelligence's 2011 survey data does not include rates for paralegals and law clerks. Unless and until reliable survey data about actual paralegal/law clerk rates in the D.C. metropolitan area become available, the USAO will compute the hourly rate for Paralegals & Law Clerks using the most recent historical rate from the USAO's former *Laffey* Matrix (*i.e.*, \$150 for 2014-15) updated with the PPI-OL index. The formula is \$150 multiplied by the PPI-OL index for May in the year of the update, divided by 194.3 (the PPI-OL index for May 2014), and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
8. The USAO anticipates periodically revising the above matrix if more recent reliable survey data becomes available, especially data specific to the D.C. market, and in the interim years updating the most recent survey data with the PPI-OL index, or a comparable index for the District of Columbia if such a locality-specific index becomes available.
9. Use of an updated *Laffey* Matrix was implicitly endorsed by the Court of Appeals in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc). The Court of Appeals subsequently stated that parties may rely on the updated *Laffey* Matrix prepared by the USAO as evidence of prevailing market rates for litigation counsel in the Washington, D.C. area. See *Covington v. District of Columbia*, 57 F.3d 1101, 1105 & n.14, 1109 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996). Most lower federal courts in the District of Columbia

have relied on the USAO's *Laffey* Matrix, rather than the so-called "*Salazar* Matrix" (also known as the "LSI Matrix" or the "Enhanced *Laffey* Matrix"), as the "benchmark for reasonable fees" in this jurisdiction. *Miller v. Holzmann*, 575 F. Supp. 2d 2, 18 n.29 (D.D.C. 2008) (quoting *Pleasants v. Ridge*, 424 F. Supp. 2d 67, 71 n.2 (D.D.C. 2006)); see, e.g., *Joaquin v. Friendship Pub. Charter Sch.*, 188 F. Supp. 3d 1 (D.D.C. 2016); *Prunty v. Vivendi*, 195 F. Supp. 3d 107 (D.D.C. 2016); *CREW v. U.S. Dep't of Justice*, 142 F. Supp. 3d 1 (D.D.C. 2015); *McAllister v. District of Columbia*, 21 F. Supp. 3d 94 (D.D.C. 2014); *Embassy of Fed. Republic of Nigeria v. Ugwuonye*, 297 F.R.D. 4, 15 (D.D.C. 2013); *Berke v. Bureau of Prisons*, 942 F. Supp. 2d 71, 77 (D.D.C. 2013); *Fisher v. Friendship Pub. Charter Sch.*, 880 F. Supp. 2d 149, 154-55 (D.D.C. 2012); *Sykes v. District of Columbia*, 870 F. Supp. 2d 86, 93-96 (D.D.C. 2012); *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 40-49 (D.D.C. 2011); *Hayes v. D.C. Public Schools*, 815 F. Supp. 2d 134, 142-43 (D.D.C. 2011); *Queen Anne's Conservation Ass'n v. Dep't of State*, 800 F. Supp. 2d 195, 200-01 (D.D.C. 2011); *Woodland v. Viacom, Inc.*, 255 F.R.D. 278, 279-80 (D.D.C. 2008); *American Lands Alliance v. Norton*, 525 F. Supp. 2d 135, 148-50 (D.D.C. 2007). But see, e.g., *Salazar v. District of Columbia*, 123 F. Supp. 2d 8, 13-15 (D.D.C. 2000). Since initial publication of the instant USAO Matrix in 2015, multiple courts similarly have employed the USAO Matrix rather than the *Salazar* Matrix for fees incurred since 2015. E.g., *Electronic Privacy Information Center v. United States Drug Enforcement Agency*, --- F. Supp. 3d ---, 2017 U.S. Dist. LEXIS 111175, at \*17 (D.D.C. 2017) ("After examining the case law and the supporting evidence offered by both parties, the Court is persuaded that the updated USAO matrix, which covers billing rates from 2015 to 2017, is the most suitable choice here.") (requiring re-calculation of fees that applicant had computed according to *Salazar* Matrix); *Clemente v. FBI*, No. 08-1252 (BJR) (D.D.C. Mar. 24, 2017), slip op. at 9-10 (applying USAO Matrix, as it is "based on much more current data than the *Salazar* Matrix"). The USAO contends that the *Salazar* Matrix is fundamentally flawed, does not use the *Salazar* Matrix to determine whether fee awards under fee-shifting statutes are reasonable, and will not consent to pay hourly rates calculated with the methodology on which that matrix is based.